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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALBERT ESTRADA CAMPOS, JR., Defendant and Appellant.	F068536 (Super. Ct. No. VCF268697) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P. J., Kane, J. and Poochigian, J.

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INTRODUCTION

In June 2012, appellant Albert Estrada Campos, Jr., fought with his neighbor after the neighbor spoke with appellant's ex-girlfriend. Appellant cut his neighbor multiple times with a knife.

A jury convicted appellant of attempted murder (Pen. Code, §§ 187, subd. (a), 664; count 1)[1] and assault with a deadly weapon (§ 245, subd. (a)(1); count 2). The jury found true that appellant acted with premeditation and deliberation (count 1); personally used a deadly weapon (§ 12022, subd. (b)(1); count 1); and personally inflicted great bodily injury (§ 12022.7; counts 1 & 2). In a bifurcated proceeding, appellant admitted special allegations that he had a prior serious felony conviction within the meaning of the three strikes laws (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that he had been convicted of three prior felony offenses resulting in prison terms (§ 667.5, subd. (b)).

For count 1, appellant received an aggregate prison sentence of 23 years to life. The trial court awarded 550 days of actual custody credits but no additional conduct credits.[2] For count 2, appellant received an aggregate sentence of 17 years in prison, which was stayed pursuant to section 654.

On appeal, appellant raises two issues. First, he contends he was denied the effective assistance of counsel when his trial attorney failed to request a jury instruction explaining that provocation should be considered in determining whether the attempted murder was committed with deliberation and premeditation. Second, he argues the trial court prejudicially erred when it failed to award presentence conduct credits for the days he was held in custody.

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1 All future statutory references are to the Penal Code unless otherwise noted.

2 Appellant's sentence in the present matter was imposed consecutively to the sentence he received in Tulare County Superior Court case No. VCF269185 (case No. 269185) for violation of Health and Safety Code section 11377, subdivision (a).

Appellant's arguments are unpersuasive. We affirm.

FACTUAL BACKGROUND

Appellant is deaf and he communicates primarily through sign language, although he attempts verbal communication at times. On June 2, 2012, he was in the process of moving out of a house which his father owned in Visalia, California. Appellant and his ex-girlfriend, Genevieve Perez, had recently ended their relationship and Perez was also moving to a new residence with their children. Appellant's sister and her fiancé, along with a common friend, were there moving into the residence that appellant and Perez were vacating. Appellant's father, Albert Campos, Sr., and his wife, Dina Campos, were there to help. Appellant appeared upset that day.

During the moving process, Perez parked her vehicle in front of the next door neighbor's driveway. When she was preparing to leave Perez apologized to the neighbor, Jose Rodriguez, who indicated it was not a problem. Appellant walked over and asked Perez why she was talking to Rodriguez. Perez believed appellant thought she was flirting.

Appellant approached Rodriguez and began yelling, asking why Rodriguez was talking to Perez. Rodriguez, who understands and can communicate a little in sign language, indicated he had not done anything. Both appellant and Rodriguez began to argue near Rodriguez's house, and they both appeared upset or angry. Both men used sign language to communicate, although people also heard appellant making loud sounds. Both men acted as if they might hit the other. Witnesses estimated they argued from either a few minutes or up to 10 minutes before they separated and Rodriguez walked into his house.

Appellant walked into his residence where Dina saw him appearing very angry. She observed appellant go into the back of the house and he reappeared holding a knife that was approximately 10 inches long. Appellant went back outside.

Appellant sat in his truck across the street. At some point Rodriguez came out of his house and walked onto the property belonging to appellant's father. Rodriguez walked over to Campos, Sr., and extended his hand, but Campos, Sr., refused to take Rodriguez's hand over a concern it would look disrespectful towards his son following their argument. Campos, Sr., backed away.

Holding a metal pipe, appellant approached Rodriguez and struck him with the metal pipe around Rodriguez's ribs or hip. Campos, Sr., grabbed the metal pipe, and appellant and Rodriguez began to fistfight. Each exchanged blows and appellant fell to the ground with Rodriguez on top of him.

While on the ground, appellant produced a knife and made upward thrusting motions. Rodriguez sustained multiple stab wounds to his face, midsection, and thigh. He was bleeding.

Dina summoned law enforcement. Rodriguez attempted to drive himself to a hospital, but on the way he ran a red light and collided with a police officer who was responding to Dina's 911 call. Rodriguez was found unconscious and bleeding profusely from his face and head. He was hospitalized and underwent multiple surgeries.

A short time after Rodriguez drove away, law enforcement located appellant at the same residence and arrested him without incident. Appellant was holding a fixed blade knife, which law enforcement collected. Appellant told the arresting officer he acted in self-defense.

Law enforcement interviewed appellant, which was videotaped with audio and played for the jury. In the interview, appellant indicated he thought Rodriguez was "making eyes" at Perez and tried to hit on her. While sitting in his truck, he saw Rodriguez approach his father and appellant had previously warned Rodriguez not to come onto his property. Appellant indicated he hit Rodriguez to protect his father and he thought Rodriguez might have had a screwdriver with him. Appellant admitted he never

saw Rodriguez holding or using a screwdriver during their fight. He stated Rodriguez is much bigger than he is and he acted in self-defense.

Appellant did not testify or introduce any evidence on his own behalf.

DISCUSSION

I. Appellant was not Denied the Effective Assistance of Counsel.

Appellant contends his trial counsel rendered constitutionally ineffective assistance when he failed to request a jury instruction, such as CALJIC No. 8.73, that provocation should be considered in determining whether the attempted murder offense was committed with deliberation and premeditation. He asserts his trial counsel could not have had any reasonable tactical reason for this failure. He argues he was prejudiced and should be resentenced on count 1.

A. Standard of review.

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569 (*Anderson*).) When such a claim is made on direct appeal, unless there can be no satisfactory explanation, the conviction must be affirmed if the record does not show the reason for counsel's challenged actions or omissions. (*Ibid.*) Even when deficient performance is present, the defendant must establish it is reasonably probable the outcome would have been different but for counsel's unprofessional errors. (*Ibid.*) """"A reasonable probability is a probability sufficient to undermine confidence in the outcome.""" [Citations.]" (*Ibid.*)

B. Background.

Regarding premeditation and deliberation, the trial court instructed the jurors with CALCRIM No. 601, informing them, in part, that "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate or premeditated." The trial court also instructed the jury on attempted

voluntary manslaughter using CALCRIM No. 603, noting that the attempted murder should be reduced if appellant acted under a "heat of passion" including "any violent or intense emotion that causes a person to act without due deliberation and reflection." The jury also received instruction under CALCRIM No. 604 regarding the imperfect self-defense doctrine.

During closing arguments, appellant's trial counsel asserted that appellant never intended to kill Rodriguez and this was not an attempted murder case. Instead, appellant acted either under a heat of passion or under the doctrine of imperfect self-defense, and defense counsel asked the jury to read those instructions. The jury was urged to find that appellant believed his father was being threatened or attacked when Rodriguez came over after the initial confrontation. It was also argued that appellant used reasonable force once he was on the ground and Rodriguez was on top of him. Defense counsel argued that the jury should return a "not guilty verdict" on count 1.

C. Analysis.

CALJIC No. 8.73 states: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

Similarly, CALCRIM No. 522 states: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]"

1. The record discloses a satisfactory explanation for defense

counsel's actions.

CALJIC No. 8.73 and CALCRIM No. 522 are pinpoint instructions which a trial court is not required to provide to the jury absent a defense request. (*People v. Rogers* (2006) 39 Cal.4th 826, 878-880.) It is undisputed that appellant's trial counsel did not make a request for one of these jury instructions. However, the defense theory was that appellant never intended to kill Rodriguez, and appellant acted either under a heat of passion or under the doctrine of imperfect self-defense.

This record demonstrates that defense counsel appeared to have had a sound tactical strategy for not requesting a provocation jury instruction regarding premeditation and deliberation. The defense sought to eliminate an attempted murder verdict. Defense counsel could have recognized that advocating a provocation defense, which includes an implied admission that appellant formed an intent to kill, would disadvantage appellant. Despite appellant's argument to the contrary, a jury instruction regarding provocation would have been inconsistent with the defense theory that appellant never formed an intent to kill. In light of defense counsel's closing arguments, appellant cannot show there is no satisfactory explanation for his counsel's actions or omissions. Thus, appellant cannot maintain a claim of ineffective assistance of counsel. (*Anderson, supra,* 25 Cal.4th at p. 569.)

2. Appellant cannot establish prejudice.

Even if appellant could establish deficient performance, he cannot establish that his counsel's actions or omissions caused the required prejudice. An instruction under either CALJIC No. 8.73 or CALCRIM No. 522 would have informed the jury it could consider provocation in deciding whether first or second degree attempted murder occurred.

However, with CALCRIM No. 601, the jury was instructed to consider appellant's mental state and whether he acted rashly, impulsively or without careful consideration in deciding if premeditation and deliberation occurred or not. Further, the jury was

instructed with CALCRIM No. 603 regarding attempted voluntary manslaughter based on heat of passion, including "any violent or intense emotion that causes a person to act without due deliberation and reflection."

Given the evidence, arguments and jury instructions, the jury was informed it should consider appellant's mental and emotional circumstances when determining whether attempted murder occurred, and whether it was done with premeditation or deliberation. It is not reasonably probable the jury would have found appellant guilty of second-degree attempted murder instead of first degree had defense counsel requested the provocation instruction. Accordingly, appellant's ineffective assistance claim fails for a lack of prejudice. (*Anderson, supra,* 25 Cal.4th at p. 569.)

II. Appellant is not Entitled to Additional Conduct Credits in the Present Matter.

Appellant asserts he is entitled to an additional 82 days of presentence conduct credits beyond the 550 actual days of credit awarded to him at sentencing. His assertion of 82 additional days is based on custody credits calculated at two days for each two days served in custody, but limited to 15 percent of the actual days in custody because he was convicted of a violent felony. (§§ 2933.1, 4019.) He contends the trial court erred in this regard.

A. Background.

For the present matter, appellant was arrested on June 2, 2012, and he spent 550 days in custody until he was sentenced on December 3, 2013. The trial court gave appellant credit for the 550 days in custody but appellant was not awarded any additional statutory credits for time served.

At the December 3, 2013, sentencing hearing, appellant was also sentenced in Tulare County Superior Court case No. 269185 for violation of Health and Safety Code section 11377, subdivision (a). In case No. 269185, appellant was sentenced to 16 months in prison, and the trial court awarded 566 days in custody with 141 days of

statutory conduct credits. Appellant's sentence in the present matter was ordered to run consecutive with the sentence imposed in case No. 269185.

Per the "Abbreviated Report and Recommendation of the Probation Officer" filed in both the present matter and in case No. 269185, appellant was arrested on August 2, 2010, in case No. 269185 and he spent 17 days in custody. He then spent the same 550 days in custody for both cases from June 2, 2012, through his date of sentencing on December 3, 2013.

B. Analysis.

Anyone sentenced to prison for criminal conduct is entitled to credit against his term of imprisonment for all actual days on confinement. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Persons detained "'prior to the imposition of sentence'" may also be eligible for certain good behavior credits under section 4019. (*Buckhalter, supra,* at p. 30.) It is the responsibility of the sentencing court to calculate the number of days the defendant has been in actual custody prior to sentencing, add any applicable good behavior credits pursuant to section 4019, and reflect the total number of custody credits in the abstract of judgment. (§ 2900.5, subd. (d); *People v. Buckhalter, supra,* 26 Cal.4th at p. 30.)

"Penal Code section 2900.5 governs the award of presentence custody credits." (*People v. Kennedy* (2012) 209 Cal.App.4th 385, 391.) Section 2900.5 states that in all felony and misdemeanor convictions, when the defendant has been in custody, all days of custody including days credited to the period of confinement under section 4019 "shall be credited upon his or her term of imprisonment." (§ 2900.5, subd. (a).) However, section 2900.5 has express limits and "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subd. (b).)

The purpose of section 2900.5 "is to ensure that one held in pretrial custody on the basis of unproven criminal charges will not serve a longer overall period of confinement upon a subsequent conviction than another person who received an identical sentence but did not suffer preconviction custody." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183-1184.) However, section 2900.5, subdivision (b), does not permit credit to be awarded more than "'once'" when a consecutive sentence is imposed on multiple charges. (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1415.) Where a defendant has multiple cases with overlapping presentence custody, the first sentencing court should award custody credits and when the second court imposes sentence, if ever, it should not award credit for time already credited to the first sentence. (*People v. Lathrop* (1993) 13 Cal.App.4th 1401, 1405.) Such a practice avoids giving the defendant duplicative credit. (*Ibid.*)

In contrast, where a defendant is in presentence custody on multiple charges and he is simultaneously sentenced on all charges to concurrent terms, the policy behind section 2900.5 applies. For these concurrently sentenced terms, "[p]resentence custody credits must apply to all charges to equalize the total time in custody between those who obtain presentence release and those who do not." (*People v. Kunath* (2012) 203 Cal.App.4th 906, 911.)

Here, appellant had an overlapping period of 550 days of actual presentence custody attributable to multiple offenses from two separate cases for which a consecutive sentence was imposed. In case No. 269185, appellant was awarded 566 days of actual custody credit with 141 additional days of statutory conduct credits. In the absence of a concurrent sentence between the multiple charges and the two cases, the policy behind section 2900.5 did not apply. Because appellant received a consecutive sentence stemming from multiple unrelated charges, he is not entitled to be credited more than "'once'" for the statutory credits. (*People v. Cooksey*, *supra*, 95 Cal.App.4th at p. 1415.)

Accordingly, appellant is not entitled to the additional good conduct credits in the present matter. (§ 2900.5, subd. (b).)

DISPOSITION

The judgment is affirmed.